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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 975

OPERATING ENGINEERS LOCAL UNION NO. 3, an unincorporated association, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, an unincorporated association, HAROLD L. BOWEN, JAMES F. CHURCH, P. H. MCCARTHY JR., et al.,

Petitioners,

vs.

B. R. BURROUGHS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

INTRODUCTION

As respects the points raised in the petition for a writ of certiorari, the decision of the Ninth Circuit

is correct for the reasons stated in its opinion. Respondent does not intend to restate those reasons in this brief. The decision below is wholly in accord with this Court's decision in *N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers,* 391 U.S. 418, 20 L.Ed.2d 706 (1968), which settled all doubt as to the questions alleged in the petition to be of importance.

The purpose of this brief is simply to demonstrate that the decision of the Ninth Circuit is correct without regard for the questions raised by the petition, and as a result, this Court would not reach those questions.

ARGUMENT

I. RESPONDENT'S GOOD FAITH, OR "CLEAN HANDS" WAS NOT A MATERIAL ISSUE IN THIS CASE.

Even if it is assumed that a union member who initiates a lawsuit against his union in bad faith is not protected under the *Marine & Shipbuilding Workers* case, Respondent's good or bad faith in commencing the suits for which he was disciplined is not a material issue here.[1]

The charge which formed the basis for the penalties imposed upon Respondent by his union was that he:

> "commenced a civil action against Operating Engineers Local Union No. 3 . . . without in the four (4) months next preceding commencement of the civil action or at any time having exhausted all or

[1]Respondent vigorously denies, however, that the actions were filed in bad faith—which would be a serious violation of the Rules of Professional Conduct by his attorney. See Cal. Bus. & Prof. Code, Sec. foll. 6076, Rule 13.

> any rights, remedies and reasonable provisions for hearing and appeal within the organization." (R. 10-13; Petition, pp. 10-11.)

No issue of Respondent's good or bad faith was in any manner presented by such charge, and his good faith was never challenged at the intra-union trials at which such charge was considered.

That being the case, his alleged bad faith may not in any way be used to uphold the penalties imposed upon him. Section 101(a)(5) of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C.A. 411(a)(5), provides:

> "No member of any labor organization may be . . . disciplined . . . by such labor organization unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

In *Allen v. International Alliance of Theatrical Stage Employees, etc.*, 338 F.2d 309 (5th Cir. 1964), it was specifically held that intra-union discipline may not be upheld on grounds not contained in the "written specific charges" required by Section 101(a)(5), and that any discipline based on other grounds must be vacated notwithstanding that such other grounds may justify the discipline. See also *Magelssen v. Local Union No. 518, etc.*, 233 F.Supp. 459 (W.D.Mo. 1964).

It would be the epitome of form over substance to say that, while bad faith may not be used to justify the penalties imposed upon Respondent because not alleged in the written specific charges, it may, under

the guise of the "unclean hands" doctrine, be used to preclude him from obtaining the equitable relief necessary to prevent the imposition of such penalties.[2]

In the present case had Petitioners wished to rely on Respondent's unclean hands to justify the penalties imposed upon him, they should have alleged bad faith in the charges upon which he was tried. Not having done so there, they may not now do so here.

II. INASMUCH AS RESPONDENT'S COMPLAINT "TOUCHED A PART OF THE PUBLIC DOMAIN COVERED BY THE [LABOR MANAGEMENT REPORTING AND DISCLOSURE] ACT," THE DECISION BELOW IS SQUARELY IN ACCORD WITH THE MARINE & SHIPBUILDING WORKERS DECISION.

In *N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers, etc., supra,* this Court held unequivocally that a union member could not be disciplined by his union for making complaints against it concerning matters within the "public domain covered by the [Labor Management Reporting and Disclosure] Act." (391 U.S. at 428).

The complaints by Respondent which formed the basis for his discipline alleged that his union's election procedures were in violation of the LMRDA. There is no question but that union elections are considered by Congress to be a part of the public domain

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[2]As stated in *Negano v. McGrath,* 187 F.2d 753, 759 (7th Cir. 1951):

> "[T]he unclean hands maxim is not an inexorable rule, but will be relaxed where public policy would be better served by so doing; and it will not be applied in such a manner to work injustice or wrong."

covered by that Act. See, e.g., LMRDA Sections 101(a)(1), 401-402, 29 U.S.C.A. Sections 411(a)(1), 481-482; *Wirtz v. Local 153, Glass Bottle Blowers Association, etc.*, 389 U.S. 463, 475, 19 L.Ed.2d 705, 715 (1968) ("Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member," and note 9 at 389 U.S. 470); *Wirtz v. Local 19, International Brotherhood of Teamsters, etc.*, 218 F.Supp. 885, 887 (D. Conn. 1963), affirmed, 330 F.2d 999 ("Congress recognized that . . . the public interest in safeguarding and improving the [union] electoral process exceeds . . . that of the members.").

CONCLUSION

Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Dated, Oakland, California,
January 7, 1970.

Respectfully submitted,

STANLEY E. SPARROWE,
Attorney for Respondent.

STARK, SIMON & SPARROWE,
MERRILL J. SCHWARTZ,
Of Counsel.